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INDEPENDENT FREE PAPERS OF AMERICA

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Office of The Secretary
Federal Communications Commission
1919 M St., N.W.
Washington, D.C. 20554

Gentlemen:

Enclosed are our Comments of the Independent Free Papers of America on the 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996: MM Docket No. 98-35.

You will find one original of these documents plus 11 copies so all Commissioners can have a copy.

Since we are not fully familiar with your procedures, I must ask: Will our organization be entered as an Intervenor in this Review and will we be sent copies of all other Comments? If we will be entered on the mailing list to receive copies, we will appreciate it. If not, please notify us how we can receive them.

Any correspondence on this matter should be directed to:

Victor Jose
15 N.W. 10th St.
Richmond, IN 47374

Thank you.



Victor Jose

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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1998 Biennial Regulatory Review -- Review of)
the Commission's Broadcast Ownership Rules)
and Other Rules Adopted Pursuant to Section)
202 of the Telecommunications Act of 1996)

MM Docket No. 98-35

COMMENTS OF

INDEPENDENT FREE PAPERS OF AMERICA

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May 8, 1998

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SUMMARY

The Independent Free Papers of America is a national trade association representing some 300 publishers of independent (not owned or controlled by paid newspaper) local free papers. These publishers are typically small, locally-owned operators, always the competitor of other local publications and the only viable print competitor of daily newspapers.

We are in full accordance and support of the longtime Commission goals of promoting competition and diversity. In our markets, our primary position is in competition with daily newspapers in the advertising field, and secondarily in providing diversity in news and opinion. In the latter, a trend of our members has been to provide more news and opinion. For instance, at the present time, some 62% of members carry some news in their pages and of this number 40% carry 25% or more news, which places them in the category of what is usually called a "free newspaper."⁽¹⁾ Of all weekly community papers now published in the U.S., the total of paid circulation is 20,481,422 and the total of free circulation is 85,154,887. The latest tabulation of total weekday circulation of all daily English language newspapers in the U.S. is 56,983,280, or by comparison, the total weekly circulation of local free community papers exceeds by 50% the entire circulation of all daily newspapers in the U.S.⁽²⁾

We strongly support the continuance of the Daily Newspaper Cross-Ownership Rule, as stated in the Notice of Inquiry, Paragraph 28, and the existing waiver rule, Paragraph 9. Any lessening of the cross-ownership rule would negatively impact every one of our members and any other independent free paper. Based on personal experience and the facts before the Commission, we believe any change cannot be justified for business necessity or the public interest.

(1) *Membership Directory*, Independent Free Papers of America (1996-1997).

(2) *Community, Specialty & Free Publications Year Book* (1998), published by Editor & Publisher magazine.

**THE FCCI SHOULD NOT ADOPT PROPOSALS SEEKING ELIMINATION
OF THE RULE IN ITS ENTIRETY, FILED APRIL 28, 1997 BY THE
NEWSPAPER ASSOCIATION OF AMERICA**

Paragraph 32: Commenting on the NAA Petition in order of arguments:

1) NAA Assertion: In adopting the rule there never was a record of evidence that cross-owned stations engaged in anti-competitive practices.

Comment: We are not aware of any impartial evidence on this point, nor do we believe the FCC found it necessary to conduct extensive evidence at the time of the ruling. Therefore, we would have to believe that any submitted evidence of the advantages of "separate operation" would be self-serving or subjective. And most importantly, the Commission based its ruling on the obvious and judicially-supported principle that effective competition is not based on claims of performance but on ownership. As the Commission stated in promulgating its rule in 1975: "It was unrealistic to expect true diversity from a commonly owned station-newspaper combination. The diversity of their viewpoints cannot be expected to be the same as if they were antagonistically run."⁽³⁾

2) NAA Assertion: In the "abundantly diverse and highly competitive mass media marketplace of the late 1990s, maintenance of these selective cross-ownership restrictions is unnecessary, discriminatory, and unjustifiable."

Comment: This is a key argument, what might be called the "everything has changed" plea. Much has changed but not everything. As to diversity, many of the emerging video-delivery systems are carriers for redistributing content developed elsewhere and do not supplant local operators who can develop or exercise control over content. Cable television stations, most of which are owned nationally, provide or can provide local origination, but they do not reach all of the potential audience and are not significant in local news or advertising. As to the local advertising market, cable does not begin to be a factor in regard to either newspaper or broadcast advertising.

⁽³⁾ FCC Order on Newspaper/Broadcast Cross-Ownership, Jan. 28, 1975.

3) NAA Assertion: The newspaper/broadcast cross-ownership rule unfairly singles out newspaper publishers, denying them the ability to realize efficiencies and synergies.

Comment: Common ownerships might result in such efficiencies, as is the case with all monopolies or lessening of competition, but there is no evidence (or expectation) that these cost savings would accrue to their advertisers or the general public. Furthermore, if daily newspapers wish to expand into broadcasting, they may do so without colliding with the cross-ownership rule. As stated in Paragraph 44: "In adopting the rule, the Commission made clear that it was avoiding any ban on joint ownership of a television broadcast station and cable system not located in the same area." This distinction is often overlooked in discussions of the rule. One's heart may bleed in reading of a speech by John Curley, CEO of the Gannett company, that the rule "has stifled competition by keeping companies such as Gannett out of desired markets," but the fact is that the media giants can enter any of their "desired markets" and own as many broadcast outlets as they want (or almost as many) -- they just can buy-up the ones in their own newspaper markets.

4) NAA Assertion: Relaxation of the newspaper/broadcast cross-ownership rule will help preserve newspapers and broadcast stations as viable media outlets and enhance diversity.

Comment: We must assume that NAA made this claim with a straight face, since there is little or no evidence of daily newspapers or broadcast stations facing bankruptcy. If there is such a case, it would fall under the current rule's waiver provisions and possibly receive favorable action as, most notably, in the Fox Television Stations (New York Post) case.

5) NAA Assertion: The rule is inconsistent with the First Amendment and has "a direct limitation on the free speech rights of a particular class of citizens."

Comment: This argument is untenable to the point of being specious, but we will have to commend NAA on being consistent. It and its predecessor, the American Newspaper Publishers Association, have always held up the First Amendment as a shield against complying with economic statutes, dating back to the child labor laws and the AP vs. Chicago Sun case. In all cases, the Supreme Court has held that the press is not immune from compliance with commonly applied legislation. And so the Court did hold when the ANPA appealed the Commission's 1975 rule, at which time it supported the Commission unanimously. Speaking for the court, Justice Marshall made it plain what principle is paramount, stating that "this court has held that application of the antitrust laws to newspapers is not only consistent with but is actually supportive of the values underlying the First Amendment." It was then and is now an economic issue. Daily newspaper publishers have plenty of opportunities to exercise their free speech within their own newspapers.

CROSS-OWNERSHIP WOULD INCREASE MARKET DOMINANCE

Paragraph 36. Competitive Effects on the Market for Advertising.

The percentages listed tell a story in themselves:

Local radio:	17.2%
Television:	30.3%
Newspapers:	49.7%
Cable:	2.9%

The current threshold figure of the Justice Dept. for radios in considering market dominance is 40%, and in almost all cases, newspapers rise above that figure. It is important to realize that daily newspaper dominance (which, in almost all cases, amounts to a local print monopoly) is a local issue, not a national one. In small-to-medium markets where there is no local television station, the daily newspaper's percentage of advertising revenue is much greater, probably in the 80%

to 90% range. Combining a daily newspaper's market power with either local radio or television would obviously reduce competition and increase prices. Any argument to the contrary flies in the face of economic theory, experience and common sense.

NAA's argument that a substantial part of its advertising revenues are comprised of classified ads is true to an extent, but there are certain categories of advertising of which radio and/or television take the lion's share. Now that a growing extension of classified advertising has emerged through the Internet, daily newspapers are moving fast into that new medium with joint operations or solely owned Internet connections (of which there is no ban on ownership) to thwart the intruders and protect their market position. It still remains that the common ownership of the newspaper juggernaut with either or both of the electronic media would be a serious blow to competition.

CO-OWNERSHIP UNNECESSARY TO SHARING

Paragraph 38. Other Economic Effects.

The argument of sharing expertise also applies to advertising situations and goes back to the time period of the Communications Act of 1934 when publishers descended on Washington demanding radio station licenses with the battle cry: "Who is more qualified to run a radio station than the publisher of the local newspaper?"

How fortunate we are that much of the development of the electronic media grew on the foundation of competition. Yes, the same beneficial results in the quality of news and public affairs programming to the public (and likewise with some advertising programs) could be achieved through joint ventures and other cooperative measures -- as it is in many cases now -- without throwing out competition.

Paragraph 39. Similar to Item 38. The convenience of common ownership does not outweigh the principle of competition.

**DAILY NEWSPAPERS ARE PRINT MONOPOLIES IN NEARLY 99%
OF ALL U.S. CITIES. CO-OWNERSHIP WITH BROADCAST
STATIONS WOULD DO NOTHING FOR DIVERSITY**

Paragraph 42. Impact on diversity.

This section, in our opinion, contains a serious error or misinterpretation, namely that “most, if not all, television markets have more than one daily newspaper...” We do not have the data on hand, but this can hardly be true. The same can be said for the following statement that, “while the leading daily newspaper in a television market can have more than a 40 percent circulation, most have less than a five percent circulation.” We do not have expert analysis in hand and the statement may be true in the largest markets, depending on how defined, but the average daily newspaper penetration is usually considered to be at least two-thirds of its trading area, and marketing managers often consider it a matter of concern if penetration falls below 60%.

In 1975, there were 1,756 daily newspapers in the U.S. and in 1997 there were 1,520 (4). There are now only 16 cities in the entire country which claim competitive daily papers, and most of these appear in larger metropolitan areas such as New York City (3 papers), and two papers in the remainder such as Denver, Chicago and Los Angeles, although a few hold-outs struggle in smaller cities. (4) These 33 papers constitute 2% of the 1,520 total, or 1.1% of all cities with daily newspapers.

It is important to know the facts of the daily newspaper slide in almost all cities into monopoly or “single ownership.” This phenomenon was first described

(4) *Editor & Publisher Year Book* (1997). Locations of competing English language daily newspapers listed were: Mountain Home, AR; Los Angeles; Pleasanton, CA; Aspen, CO; Denver; Montrose, CO; Washington, D.C.; Chicago; Boston; Columbia, MO; Berlin, NH; Trenton, NJ; New York City; Wilkes-Barre, PA; Manassas, VA; Green Bay, WI.

in 1965 (5), and it then became a major factor in hearings before Congress in 1968-1970 before passage of the Newspaper Preservation Act of 1970. To cite just one bit of testimony -- and that coming from an official of the daily newspaper industry -- Arthur B. Hanson, general counsel of the American Newspaper Publishers Association, testified as to the inevitability and irreversibility of the process: "Economic analysis, confirmed by actual experience, reveals the causal effects of the downward spiral of a failing paper in a two-daily city. A marked decline in circulation of one daily relative to its rival daily...sparks off a causally connected substantial loss in advertising revenue...Once one of the two city dailies builds up a circulation substantially outstripping that of its rival, the irreversible downward spiral for the failing paper sets in. As the prospering paper gains increases in circulation and advertising, it has the resources to spend on news and editorial staff...As the quality and coverage of the profitable paper are elevated, the increased circulation attracts more advertising patronage. In sum, the upward cycle of the profitable paper takes place concurrently with the downward cycle of the failing paper and leads to the latter's total demise." And Hanson added that "the prospect of a new independent entry in the city of a daily to replace the failed one is virtually nil." (6) And that is exactly how the scenario has played out in these 30-some years, so there are now only the 16 competing dailies in 1.1% of American cities.

Three conclusions can be clearly drawn from the above: 1) Daily newspapers now enjoy a monopoly status among local print media in all but 1.1% of their markets, except for 2) Independent free papers which are the only viable print competition, and 3) Since newspapers cannot be regulated by license, the cross-ownership rule is the only barrier standing in the way of even greater market power

(5) Victor Jose, "Do Newspapermen Really Want Competition?" *Quill* magazine, August, 1965.

(6) Arthur B. Hanson, Hearings Before Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives on H.R. 279 and Related Bills, Serial No. 8, page 141 (1970).

**ALTHOUGH THERE IS SOME OVERLAP AND SOME EXCLUSIVITY TO BOTH
PRINT AND BROADCAST ADVERTISING, COMBINING THEM UNDER ONE
OWNERSHIP WOULD ONLY INCREASE MARKET DOMINANCE**

Paragraph 49. Advertising substitutes.

The possibility of advertising substitutes has always been conjectural, but it has long been acknowledged that there is substantial affinity toward either print or electronic media in certain types of both news and advertising, as mention in Paragraph 38 above.

In 1974, the Eighth Circuit Court of Appeals found in favor of the *Morning Pioneer* of Mandan, ND, against the *Bismark Tribune* of Bismark, ND in the latter's practice of blanketing the Mandan area with free copies as a violation of the Sherman Antitrust Act as "illegal attempts to monopolize." Writing for the court, Judge Gerald W. Heaney noted that the presence of radio and television outlets would not prevent the Tribune "from exploiting its position as the only daily newspaper because electronic media is (sic) not wholly competitive with respect to some types of news and advertising." (7)

Although this is not conclusive evidence of the relation of daily newspapers and electronic media, it supports the long-held recognition that electronic media are competitive with daily newspapers in only a small segment of the market -- and by extension, this can be said of the plethora of the more recent new-born electronic entries.

Regardless of how much overlap there may or may not be, placing the monopoly daily in bed with one or more of the local electronics would be bad news for any other local print medium or any electronic medium which might survive.

(7) Eighth Circuit Court of Appeals, St. Louis, MO., ruling of March 12, 1974.

THE CURRENT WAIVER POLICY COVERS ALL VALID EXEMPTIONS WITHOUT UNDERMINING THE RULE

Paragraphs 55-58. Waivers.

As we understand it , the granting of conditional waivers as a blanket approach would indeed cloud the rule's application and make enforcement unworkable. The present waiver standards are entirely appropriate.

It is also important to examine any waiver on the basis of both diversity and competition. As stated in the Commission's order of Dec. 5, 1996: "A waiver that might be acceptable in terms of its impact upon diversity might create such market power in a single entity that it would not be tolerable in terms of competition."

A change of the waiver rule has been suggested by the National Newspaper Association (NNA), namely to change the waiver rule to a presumption in *favor* of cross-ownership, which would obviously be tantamount to abolishing the rule.

Another suggestion has been made to subject petitions to "objective tests" of whether the combination is actually providing diversity. This not only ignores the question of market power but enters almost unchartable waters in a thicket of variables and subjective judgments which impinge on constitutional issues of government control by content.

COMMENTS ON STATEMENTS BY MEMBERS OF THE COMMISSION

Statement of Chairman William E. Kennard.

We agree strongly with his statement: "Both competition and diversity are all the more important today because we recently have experienced the most dramatic increase in consolidation in the broadcast industry in our history."

Rather than the claims that "everything has changed" to provide more diversity in both outlets for news and opinion and advertising choices, as maintained by NAA and others, the opposite is true. Consolidation of ownership

in both television and radio ownership has proceeded at breakneck speed since the Telecommunication Act of 1996, and monopoly daily newspaper ownership has risen to nearly 99% in American cities. This should be a cause for deep concern and a renewed emphasis on preserving and encouraging what is left of diversity and competition.

Small, independent, local businesses deserve special attention in pursuing these goals.

Statement of Commissioner Susan Ness.

We strongly agree with her statement: "What's needed are independently owned outlets -- not a variety of content controlled by one owner."

In view of the onrushing consolidation, it is even more important than ever to preserve local competition, as protected by the cross-ownership rule.

Statement of Commissioner Harold W. Furchtgott-Roth.

We approve of his format of questions in analyzing any proposed change in the cross-ownership rule, especially comparing the status of relevant markets at the inception of the rule and the current status. We have tried to address some of these questions in the foregoing.

Statement of Commissioner Michael Powell.

Again, we approve of his call to compare past with present states of competition.

We also agree that defining and analyzing diversity is a sometime sticky matter, but we believe that it is still one of the all-important criteria which can be applied, in different ways, to both diversity of news/opinion and to competition. In most cases, the standard of judgment hinges on ownership rather than product.

Statement of Commissioner Gloria Tristani.

We couldn't agree more in the importance of diversity as a key element in making the First Amendment effective to all peoples. And we would agree that the twin interests of competition and diversity must be analyzed separately, although both objectives are often achieved in tandem. For instance, when daily newspapers are considered, we must start with the fact that they hold a monopoly of ownership status in nearly 99% of the cities in which they operate. Whatever their policies and whatever their current programs, giving them the opportunity to add one or more electronic outlets in their own market cannot do anything but reduce both diversity and competition. That is why the cross-ownership rule must be retained to give both diversity and competition a chance.

THE FINANCIAL POSITION OF DAILY NEWSPAPERS DOES NOT JUSTIFY BREAKING THE CROSS-OWNERSHIP RULE

It is important in examining the cross-ownership rule to understand the financial position of daily newspapers in today's America.

For many years, people have believed that daily newspapers are a declining industry. Not so. The *number* of daily newspapers has declined substantially, as cited above, but not the number of cities in which they reside. There is a daily newspaper (usually only one) in every U.S. city large enough to support one.

And they are more prosperous than ever. During a slump in the industry in the early 1990s, there was widespread talk among their detractors that dailies had at last met up with that predicted decline and they were on the way out. Since then, they have made a remarkable recovery, especially on the financial side. Of course, the undergirding source of stability and profit is their monopoly, or "single

ownership" status -- a position they reach inevitably, as explained above. Choosing only one from a welter of confirming sources, Linda Snyder, writing in *Fortune* magazine, explains: "The principal appeal of owning a daily newspaper...is that in a small or medium-sized city, the publisher holds a virtual monopoly...And unlike other local monopolies -- utilities, for example, or small airlines -- newspapers are unregulated. The owner of the local newspaper has no government restrictions on him when he sets his prices." (8) Even in the early 1990s, researchers William Blankenburg and Gary Ozanich found that: "The return of revenues for public newspaper companies has been about twice as high as those of the Fortune 500 and S&P's 400 industrial companies." (9) The gap has moved even higher since then.

Two other factors are worth considering when analyzing the business opportunities of daily newspapers. One is the already-mentioned fact that the Commission has never barred newspapers from broadcast ownership in markets other than those in which their papers operate. Secondly, daily newspapers are finding many new avenues for expansion and profiting, such as niche publications, allied businesses (such as job fair companies), financial service offerings, etc., and most notably their recent surge in setting up home pages on the Internet, often producing an income stream, and extending the reach of their classified sections into regional and larger markets -- a growth business in which they are very likely to dominate.

In passing, it might be asked why the NAA has been joined in its petition to abolish the cross-ownership rule by its erstwhile fierce competitors, the National Association of Broadcasters and the Association of Local Television Stations? Have these traditional "antagonistic" foes suddenly felt pangs of remorse about the bad

(8) Linda Snyder, *Fortune* magazine, June 1977.

(9) Wm. B. Blankenburg & Gary Ozanich, *Journalism Quarterly*, Spring, 1993.

things they have said about newspapers? Have they decided that daily newspaper publishers can run their stations better than they can? Hardly! They know that the demise of the cross-ownership rule would elevate the market value of their stations, especially if sold to a daily newspaper which will pay a premium to acquire a broadcast station in its own market and thus extend its market dominance.

HISTORY SUPPORTS DIVERSITY AND COMPETITION

While the twin principles of diversity and competition have always guided the American republic, as imbedded in the First Amendment and articulated in the antitrust laws, their application to broadcast issues became focused in the preparation of the Communications Act of 1934.

We believe that a few highlights in the history of controversies over cross-ownership during the last 64 years are pertinent and give perspective to the current review:

- It is not common knowledge that President Franklin Roosevelt strongly favored a cross-ownership rule when the 1934 Act was still being debated. J. David Stern, in his autobiography, *Memoirs of A Maverick Publisher* (1962) tells of visiting the President in Washington:

"How do you feel about newspapers owning radio stations?" the President asked me in 1934, when the importance of this new method of mass communication was beginning to be recognized.

"It's against the public interest," was my answer. "And especially so in one-newspaper cities."

"That's the way I'm thinking," Roosevelt said. "And that's what I'm going to tell the FCC, but your fellow publishers are bringing a lot of pressure to get into the radio game."

And later:

When I confronted the President with his shift in policy he was frank: "I've more important fish to fry on the Hill." At the time I did not blame him for his expediency. I knew how publishers were putting

the heat on their Senators and Congressmen, who, in turn, were ganging up on the White House to grant radio licenses. A score of newspaper-owned radio stations seemed a small price to pay for New Deal legislation. Thus died the obviously sound policy against newspaper-radio, and later -television, monopolies.

- The Department of Justice has always favored the principle of a cross-ownership ban. In 1970 during the Nixon administration, the Department and interest groups urged the Commission to ban any new cross-ownerships and argued, on antitrust grounds, that divestiture should be ordered for all cross-ownerships then in existence.

- After years of study, on Jan. 28, 1975, during the Ford administration, the Commission issued its first ban on all future cross-ownerships, but exempted (grand-fathered) all existing cross-ownerships except 16 so-called “egregious” combinations. At the same time, the Commission set forth its four-fold “very stringent waiver criteria.” Critics at the time considered the 1975 ruling as “a compromise considerably milder than a 1970 proposal” to bar all existing and future cross-ownerships.(10) Soon after, the ANPA appealed the ruling.

- On March 1, 1977, the U.S. Court of Appeals, District of Columbia Circuit, upheld the Commission’s ban on future co-located newspaper/broadcast cross-ownership combinations and also directed the Commission to force divestiture of all existing combinations, unless the combination could be proved to be in the public interest.

- The U.S. Supreme Court granted certiorari on Oct. 3, 1977, in the case, ANPA v. National Citizens Committee for Broadcasting, and on Nov. 17 the ANPA filed a brief appealing both the 1975 Commission rule and also the federal appeals court ruling extending the ban to all existing combinations.

(10) *Editor & Publisher* magazine, February 1, 1975.

- In 1978 during the Carter administration, the U.S. Supreme Court upheld the Commission's cross-ownership rule *unanimously*, but overturned the Appeals Court ruling to extend the ban to all existing combinations.

- During this same time period, the Justice Department's antitrust case against AT&T was wending its way through the U.S. District Court of Judge Harold H. Green who, on Aug. 24, 1982, during the Reagan administration, announced a consent decree which would, in essence, bar the giant telephone company from originating news content transmitted on its lines. Now on the side of the angels, Terry Maguire, ANPA general counsel, declared: "This wise public policy mirrors ANPA's 'Diversity Principle' in providing that a telephone company which controls transmission *conduit* may not also control the *content* of information which must use that conduit. Such control could stifle diversity in the electronic information marketplace."(11)

- Now in 1998, we find that for the ANPA's successor association, NAA, the shoe is on the other foot as far as the importance of diversity is concerned. NAA now argues that a combination of both content and conduit between daily newspapers and local broadcast stations is no longer a threat to diversity or competition.

We suggest that in the 64-year-old history of the cross-ownership rule, the evidence is clear that the thirst of daily newspapers for private gain and advantage has always collided with the principles of diversity and competition, except in the AT&T case where standing on the other side coincided with their own benefits. Regardless of assaults by self-interest, the pillars of diversity and competition remain paramount and should be jealously guarded in the public interest.

(11) Terry Maguire, *Editor & Publisher* magazine, September 4, 1982.

CONCLUSION

We contend that the Commission's cross-ownership rule is one of the finest examples of enlightened public policy and its continuance is urgently needed to serve the public good.

We are also mindful that advocacy of the current rule has virtually no powerful constituency and that its defense falls most directly on the shoulders of small local publications, both paid and free -- and on the unorganized public.

We believe that the facts cited above demonstrate that abolishing the cross-ownership rule cannot be justified by business necessity or the public interest.

We strongly urge the Commission to stand firm in support of the principles of diversity and competition as embodied in the cross-ownership rule.